Nos. 02-1025 and 02-1038

MAR 10 2003

CLERK

IN THE

Supreme Court of the United States

SERENA NILES,

Petitioner,

-and-

SALVATORE A. BONO,

Petitioner,

v.

GEOFFREY M. PARKINSON,
as Trustee of the Laura J. Niles Trust, and
THE LAURA J. NILES FOUNDATION, INC.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

JOHN A. RIDLEY
Counsel of Record
BRUCE L. SHAPIRO
DRINKER BIDDLE & REATH LLP
500 Campus Drive
Florham Park, NJ 07932-1047
(973) 360-1100

Attorneys for Respondents

179522

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether a litigant in a matter pending before a state court judge can, by filing a meritless federal suit naming the state court judge as one among 23 defendants, and thereby requiring the state's attorney general's office to appear on behalf of the judge and obtain a dismissal of the federal suit, force the recusal of the state court judge at the risk of creating a viable due process claim.

2. Whether a writ of *certiorari* should issue in a case in which: (a) the petitioner did not raise, and the court below did not address, the questions presented in the petition; (b) the decision as to which the petitioner seeks review is an unpublished opinion with no precedential value from an intermediate state appellate court; and (c) the judgment below is not final as to all issues among the parties.

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STATEMENT OF THE CASE

This is a story of extreme avarice and greed on the part of opportunists Serena Niles (hereinafter "Serena") and her son Salvatore A. Bono (hereinafter "Sal"), who sought to ravage the multi-million dollar estates of two physically and mentally infirm octogenarians.

The Laura J. Niles Foundation, Inc. (hereinafter "Foundation") is the remainder beneficiary of three inter-vivos trusts created by Laura J. Niles (hereinafter "Laura") between 1992 and 1994 of which Geoffrey M. Parkinson (hereinafter "Parkinson") was the trustee. Pa681a.[1]

Laura, a childless octogenarian who had never married, was the heiress to a $30 million fortune. Laura's younger brother, Henry E. Niles (hereinafter "Henry"), was likewise a never-married, childless octogenarian who was the heir to a similar size fortune. Parkinson was a life-long friend of the Niles family, as well as Laura's and Henry's financial adviser and the trustee of the trusts.

By the early 1990's, Henry was in physical and mental decline, to the point that he had become incontinent and had allowed himself to be swindled out of one million dollars by an unscrupulous broker. Because of this, a proceeding was commenced in New York state court to have his affairs placed in the hands of a conservator. Pa655a. Around the same time, Serena Bono (later Serena Niles), one of the owners of a

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1. For the purposes of this brief, references to the Appendix filed in the Appellate Division of the Superior Court of New Jersey on behalf of Geoffrey M. Parkinson will appear as "Pa__"; references to the Joint Appendix filed on behalf of Geoffrey M. Parkinson and The Laura J. Niles Foundation, Inc., will appear as "Ja__."

local restaurant who was approximately 30 years Henry's junior, began spending a considerable amount of time with him and subsequently announced that she would like to marry him. A temporary restraining order was entered in the conservatorship proceeding to prohibit the marriage from taking place while the matter was pending. Pa676a. Despite the restraining order, Serena married Henry in November, 1992. The conservator who was appointed in the New York proceeding sought to have the marriage annulled; however, that issue was resolved by the execution of a post-nuptial agreement limiting Serena's right to inherit from Henry's estate. Pa740a. (Following Henry's death, Serena sued to have the post-nuptial agreement set aside. That action eventually settled with Serena receiving millions.)

By 1997, Laura's health was in a fragile state; and she required daily nursing care. She had already been diagnosed as suffering from organic brain syndrome, rendering her cognitively impaired, particularly with respect to making personal and financial decisions. Parkinson, her long-time friend and financial advisor, was by then providing advice and services in that regard.

Serena, taking advantage of Laura's diminished capacity, began to insert herself into Laura's personal decision-making process and started a campaign of slander against Parkinson. About that same time, Serena's son Sal convinced Laura to meet with a law firm selected by him. The upshot was that in 1997 Laura signed a series of complex testamentary papers that made profound changes to her estate plan, including, *inter alia*, discharging Parkinson as her trustee and installing Sal in his place; revoking her Last Will and Testament and replacing it with an instrument making two million dollars in specific bequests to Sal's family, including his mother,

Serena; completely disinheriting the Foundation; and diverting the entire residuary estate to a new foundation controlled by Sal, Serena, and their business associates. Pa1019a-1092a.

Parkinson and the Foundation filed actions in the Superior Court of New Jersey, Chancery Division, Probate Part, Warren County, to invalidate the testamentary instruments executed by Laura in 1997 on the grounds that they had been procured through the undue influence of Serena and Sal. Pa1a, 371a, 394a. The presiding judge was the Honorable Harry K. Seybolt of the Superior Court of New Jersey. At an early point in the proceeding, Judge Seybolt appointed Michael S. Selvaggi, a Warren County attorney, to act on Laura's behalf as her guardian *ad litem*.[2, 3] Pa2a.

Parkinson and the Foundation ultimately prevailed in the trial court, which removed Sal as trustee, invalidated the 1997 testamentary papers thereby restoring Laura's prior Last

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2. On pages 10-11 of Serena's petition and on page 8 of Sal's, they claim that Parkinson had Mr. Selvaggi appointed through an *ex parte* proceeding with the court. That claim is patently false, and no evidence has ever been adduced to support it. Mr. Selvaggi was selected by the court. Parkinson, who lives and works in Connecticut, had never heard of Selvaggi prior to his appointment.

3. Serena and Sal also claim at pages 11 and 8, respectively, that 18 witnesses submitted affidavits stating that Selvaggi's report to Judge Seybolt misquoted them and falsified statements attributed to them. After our repeated and unanswered calls to produce the 16 alleged affidavits that are not in the record, counsel for Sal filed with this Court and served a notice of errata purporting to correct that misstatement, stating: "[a]t least two witnesses submitted . . . affidavits . . ." The fact of the matter is that *only* two such affidavits are part of the record or have ever been seen.

Will and Testament and the trusts, restored Parkinson as the trustee, and assessed damages against Serena and Sal. Pa498a, 550a. The judgment against Sal was ultimately by default. In his opinion, Judge Seybolt stated: "It is this Court's conclusion that there is no clearer case of undue influence than the one presently before this Court." Pa536a.

Judge Seybolt's decision to enter default against Sal was made after a full year of rampant and unrepentant litigation abuses by Sal — conduct that included defiance of court orders, refusal to provide crucial discovery, and, ultimately, failure to appear at trial. Ja97a-110a. Some of the "highlights" of Sal's misbehavior during the litigation include his:

- Sending a series of *pro se* letters to the trial court teeming with factually baseless and highly tendentious accusations of "corruption" and "bias" against his adversaries, his own lawyers, and Laura's court-appointed guardian *ad litem*. Pa304a, 315a, 319a.

- Refusing to furnish "family videotapes" of Laura, which he admitted existed and which would have been relevant to the trial court's findings of fact concerning Laura's mental capacity.

- Walking out of the hearing on his accounting for his service as Laura's fiduciary after two and a half days of evasive and unresponsive testimony. Ja115a. Sal simply walked out of the proceeding, never to return. Instead, he filed a 303-page "RICO" complaint in the United States District Court for the Eastern District of New York, naming as defendants

the attorneys for Serena's adversaries in the New York litigation concerning Henry's estate; all of the attorneys representing adversaries in the New Jersey action; court appointed individuals in both the New York and New Jersey actions; discharged attorneys who had previously represented him in the New Jersey action; and various court officials — most notably, Judge Seybolt. Pa417a, Ja69a.

- Moving in the trial court for Judge Seybolt to recuse himself on the basis of Sal's having named him a defendant in the RICO action. Ja96a.

The RICO action was dismissed in a 42-page Memorandum and Order entered by United States District Judge Thomas C. Platt.[4] Pa570a. Judge Seybolt was represented in that action by the New Jersey Attorney General's office, which moved for dismissal on the basis of judicial immunity and merely sent a letter to the court adopting the arguments of the other defendants moving for dismissal on the merits of the RICO action. With respect to Sal's specific claims against Judge Seybolt, Judge Platt ruled that the United States District Court lacked subject matter jurisdiction and was without authority to review decisions as to state court proceedings pursuant to the *Rooker-Feldman* Doctrine, as well as the Eleventh Amendment to the United States Constitution. Pa583a-587a. Further in his opinion, Judge Platt stated that Judge Seybolt was absolutely immune from Sal's allegations based on the doctrine of judicial immunity. Pa605a-606a. While discussing the Abstention Doctrine as another reason

4. Serena was never a party to the RICO action.

for dismissing Sal's claims against Judge Seybolt, Judge Platt stated: "Plaintiff does not allege facts which support his claim that Judge Seybolt is biased against him, but rather his only basis for this charge is the existence of rulings adverse to his position in the New Jersey action." Pa587a. Sal took no appeal from that dismissal.

Serena and Sal appealed Judge Seybolt's decision to the Appellate Division of the New Jersey Superior Court (hereinafter "Appellate Division"), arguing, *inter alia*, that Judge Seybolt was biased against them. In doing so, they relied on the New Jersey Code of Judicial Conduct, the federal recusal statute, and New Jersey Court Rules. They never raised the issue of Fourteenth Amendment violations. Parkinson and the Foundation cross-appealed on issues of damages. The Appellate Division affirmed Judge Seybolt's judgment in its entirety, noting in its opinion that: "The trial judge exercised remarkable restraint throughout and displayed a clear and constant intent to provide Salvatore ample and adequate opportunity to be heard."

Serena and Sal then petitioned the New Jersey Supreme Court for certification of the issues that had been appealed to the Appellate Division. Parkinson and the Foundation cross-petitioned on issues of damages. The New Jersey Supreme Court denied Serena's and Sal's petitions but granted Parkinson's and the Foundation's cross-petition. Oral argument is scheduled to take place on March 17, 2003.

Neither Serena nor Sal posted a *supersedeas* bond with the trial court to stay execution of the judgment during the appellate process. Accordingly, the judgment was domesticated in New York, where both Serena and Sal are

residents. Execution was effected against Serena for the amount for which she was adjudged liable. Sal, on the other hand, has appealed an order of the Supreme Court of the State of New York, Kings County, that amended a prior order of that court to reflect properly the damages levied against him by Judge Seybolt (App. A1); and the matter is now before the Appellate Division of the Supreme Court of the State of New York, Second Department (App. A4).

For a more exhaustive recitation of the facts of this case, the Court's attention is respectfully invited to the *per curiam* opinion of the Appellate Division at pages A3 through A75 of Salvatore A. Bono's petition.

REASONS FOR DENYING THE PETITIONS

The petitions for writ of *certiorari* should be denied for three discrete reasons.[5]

A. *Certiorari* Is Unwarranted Because Neither the Record nor the Decision Below Raise or Address the Questions Presented by the Petitions.

In reviewing state court judgments under 28 U.S.C. § 1257, this Court adheres to the general rule that it will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that

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5. Although the issue of whether or not the trial judge should have recused himself is best left to a merits brief, we are obligated to point out that the petitioners rely on *Republic of Panama v. American Tobacco Co., Inc.*, 217 F.3d 343 (5th Cir. 2000) in support of their arguments for recusal. This Court reversed that case *sub nom.*, *Sao Paulo State of the Federative Republic of Brazil v. Am. Tobacco Co.*, 535 U.S. 229 (2002).

rendered the decision for which the petitioner seeks review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). If the highest state court was silent on the federal question presented to this Court, the assumption is that the issue was not properly presented below. *Id.*; *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983).

Serena never raised the issue of due process in her appeal to the Appellate Division or in her petition for certification to the New Jersey Supreme Court. The sole issues that she raised in those courts were: (1) that she should not have been stripped of a condominium in Florida that the trial court found she had acquired from Laura as a result of undue influence; and (2) that she should not have been assessed surcharges, fees, and damages by the trial court. Neither her appeal nor her petition in the New Jersey state courts ever mentioned an issue with which this Court should be concerned.

In his appeal to the Appellate Division and in his petition for certification to the New Jersey Supreme Court, Sal mentioned the "Fourteenth Amendment" and made vague claims of his being deprived of "due process rights" as the result of adverse rulings by the trial court. Other then complaining that New Jersey law was being misapplied, he did not mention or argue that the trial court's rulings were unconstitutional under the Due Process clause. As this Court stated more than 40 years ago: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity *** of judicial decisions *** (or) immunity from judicial error ***' [Citation omitted.] Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck v. Washington*, 369 U.S. 541, 554-55 (1962).

Significantly, the Appellate Division did not address Sal's vague utterances concerning "due process"; and the New Jersey Supreme Court denied his petition for certification. It must therefore be assumed that he did not present the issue properly. *Adams v. Robertson*, *supra* at 86; *see also*, *Crowell v. Randell*, 35 U.S. 368 (1836), wherein Justice Story stated:

> In the interpretation of this section of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails.

Id. at 392.

This Court, in exercising its appellate jurisdiction, will consider questions not pressed or passed upon in the courts below only in exceptional cases *that come from the federal courts*. *McGoldrick v. Companie Generale Transatlantiqe*, 309 U.S. 430, 434 (1940). This case, of course, comes from the New Jersey state courts. This Court should therefore not depart from this practice in the exercise of its appellate jurisdiction.

B. *Certiorari* Is Unwarranted Because the Petitioners Seek Review of an Unpublished Opinion of an Intermediate State Appellate Court That Has No Precedential Value.

New Jersey Court Rule 1:36-3 provides in pertinent part: "No unpublished opinion shall constitute precedent or be binding upon any court." Accordingly, other New Jersey courts considering issues similar to those below may possibly reach different conclusions, especially since the finding of undue influence on the part of Serena and Sal turned so much on issues of fact.

"Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts." *Easely v. Cromartie*, 532 U.S. 234, 242 (2001). The Appellate Division affirmed the judgment of the trial court only after an exhaustive review of the trial court's factual findings. The petitioners have not presented reasons why this Court should revisit those findings.

Given the fact intensity of the issues of which the petitioners complain and the absence of precedential effect of the decision below upon any other case or controversy, there is no reason why this Court should grant *certiorari*.

C. *Certiorari* Is Unwarranted Because the Judgment Below Is Not Final as to All Issues Among the Parties.

This Court's ability to review state court decisions is limited to final judgments rendered by the highest court of that state. *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 77 (1997). This principle serves the purpose of preventing piecemeal review of state court decisions. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). All rights must be fully adjudicated, and the adjudication should not be subject to further review by a state court. *Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 268 (1942). "[T]he rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." *Collins v. Miller*, 252 U.S. 364, 370 (1920).

The rights and obligations among the parties to this case are currently under review in the appellate courts of two states. The cross-appeal of Parkinson and the Foundation on issues of damages is currently before the New Jersey Supreme Court and scheduled for oral argument. Following the domestication in New York of the judgment of the New Jersey trial court, Sal has appealed the amount of the New Jersey judgment to the Appellate Division of the New York Supreme Court.

Given his history in these proceedings, it is likely that Sal will again petition this Court to review the matters currently under consideration by the New Jersey and New York appellate courts should they rule against him. Likewise, if Serena remains true to form, she will follow suit.

Accordingly, neither petition is ripe for *certiorari*.

CONCLUSION

The petitions for a writ of *certiorari* should be denied.

Respectfully submitted,

JOHN A. RIDLEY
Counsel of Record
BRUCE L. SHAPIRO
DRINKER BIDDLE & REATH LLP
500 Campus Drive
Florham Park, NJ 07932-1047
(973) 360-1100

Attorneys for Respondents